Supreme Court, U.S.
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No.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET JONES,

Petitioner,

vs.

MARVIN T. RUNYON, Postmaster General,
United States Postal Service,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether filing a complaint with EEOC and thereby exhausting administrative remedies is a "jurisdictional prerequisite" to suit under Title VII.

II. When a pro se complainant files a charge of discrimination with an EEO Counselor/Investigator, is there a duty of the Counselor/Investigator to assist and advise the complainant in framing the issues?

III. Can other female employees who were qualified for but were denied the benefit of promotion because of favoritism based upon coerced sexual conduct with another female establish quid pro quo harassment under Title VII?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix A - Order of the United States District Court for the Western District of Oklahoma dated February 10, 1995.

Appendix B - Opinion of the United States Court of Appeals for the Tenth Circuit dated July 31, 1996.

Appendix C - EEOC Notice Number N-915-048, January 1990.

Appendix D - 29 CFR § 1604.11(g)

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SUPREME COURT OF THE UNITED STATES

October Term, 1995

JANET JONES,

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MARVIN T. RUNYON, Postmaster General,
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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Janet Jones, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for

the Western District of Oklahoma granted judgment in favor of Marvin Runyon on February 10, 1995. (Appendix "A"). Jones thereafter filed her notice of appeal on March 10, 1995 to the United States Court of Appeals for the Tenth Circuit. On July 31, 1996, the Appeals Court affirmed the decision of the District Court. (Appendix "B"). In so doing, the Tenth Circuit Court of Appeals held that

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is July 31, 1996. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTE INVOLVED

The pertinent provision of Title VII

of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII") is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Also, see Appendix "C," EEOC Notice

Number N-915-048, January 1990 and Appendix "D," 29 CFR § 1604.11(g).

STATEMENT OF THE CASE

When she was non-selected for promotion, Janet Jones first filed a complaint against her supervisor, Carl Noblitt, on July 10, 1990, charging discrimination based on "sex (female)." In her complaint she specifically requested that Mr. Johnnie Reed (the local in-house EEOC Counselor/Investigator) not be assigned to her case. Notwithstanding Jones' request, Reed was assigned to investigate her case. In the course of the investigation, Jones conveyed the following to Reed either by written statement or affidavit: that one of the successful candidates, a female, was selected by the supervisor because of a

romantic relationship; that said supervisor had made remarks which she interpreted as unwelcome sexual advances; that another male employee had been given promotional preference over her; and, that she provided Reed with eighteen witnesses. Reed gave Jones Notice of Final Interview of her complaint on November 1, 1990, and she was advised that she had fifteen days in which to file a formal complaint. However, Reed did not interview any of the witnesses before the Notice of Final Interview was given. Jones filed a formal complaint which was received by the Postal Service on November 13, 1990. Thereafter, February 1, 1991, only two of Jones' eighteen witnesses were interviewed by Reed.

On November 27, 1990, Jones notified

the Postal Service:

> The type of harassment you have listed is sex-female, this is incorrect. I was not discriminated against because of being female. I was discriminated against because of a relationship between Carl Noblit and Alice Kilgore. I am filing under sexual harassment in accordance with Sec. 703 of title VII of the Cival [sic] Rights Act which states "Other related practices include a situation in which employment opportunities or benefits are granted because of on [sic] individual's submission to the employer's sexual advances or requests for sexual favors. The employer may be held liable for unlawful sex discrimination against other persons who were qualified for, but denied that employment opportunity or benefit.

The Postal Service notified Jones that it found no basis for the charge of discrimination and Jones appealed to the EEOC and EEOC affirmed the Postal Service's decision. Jones brought this action in the United States District

Court for the Western District of Oklahoma and the case was administratively closed pending this Honorable Court's resolution of cases dealing with the retroactivity issue as it applies to the Civil Rights Act of 1991. The case was reopened after this Honorable Court's decision in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). The defendant moved the district court to dismiss, alleging that Jones was not protected under Title VII where the supervisor showed preference to the selectee, even if they did have a consensual relationship; and secondly, Jones had failed to exhaust administrative remedies as to her retaliation claim. The trial court erroneously ignored the main claim of sexual harassment based on the

relationship between subject supervisor and Kilgore. The trial court concluded that Jones was only alleging that she had been the victim of quid pro quo sexual harassment; thereby, finding that Jones had not exhausted that claim through the administrative process. Conversely, Jones made averments in her amended complaint clearly adopting the main claim of sexual harassment as processed through the EEOC, which involved Alice Kilgore and subject supervisor, and in addition thereto, alleged that she had personally been the victim of quid pro quo sexual harassment and discrimination based on gender. The Tenth Circuit Court of Appeals affirmed the trial court's decision, and in doing so recognized the split among the Circuit Courts regarding the treatment of "filing a complaint with

EEOC" as being a jurisdictional prerequisite to suit in federal court. The Tenth Circuit said "because one panel cannot overturn the decision of a prior panel, we are bound by our prior Tenth Circuit authority. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994)." The Tenth Circuit further stated in footnote 6 of its Opinion filed July 31, 1996:

> The distinction between characterizing the EEOC filing requirement as either jurisdictional or as a non-jurisdictional affirmative defense could have an impact on our ruling regarding Jones' retaliation claim.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeal on whether or not subject matter jurisdiction in federal court can be

invoked where there has been no filing with the EEOC.

Further, Petitioner seeks review of this case because the Tenth Circuit has rendered a decision in conflict with this Court and because the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In Zipes v. Trans World Airlines, Inc., 102 S.Ct. 1127 (1982), this Honorable Court held:

> ...that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court...The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

This Court further stated "Although subsequent legislative history is not

dispositive, ...the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement." Zipes at 1133. This Court recognized the final Conference Committee section by section analysis of H.R. 1746, the Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972) wherein the Committee termed the final period a "time limitation." This Honorable Court went into great detail in its footnotes 11, 12 and 13 in an attempt to clarify the Court's intention and Congress' intention to treat the filing as a limitations period rather than jurisdictional. The Court cited Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), recognizing congressional

approval of cases that awarded relief to members who had not exhausted administrative remedies before EEOC and thereby said, "It is evident that in doing so Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court."

The Tenth Circuit in its Opinion recognized the Fifth, Ninth and Eleventh Circuit holdings that the filing with EEOC is not jurisdictional. Whereas the Fourth and Seventh Circuit holding that the filing with EEOC is jurisdictional before suit can be brought in federal court. While the Tenth Circuit treats "filing" as a jurisdictional prerequisite (Sampson, infra), It

recognizes the dichotomy stemming from the rationale in United States vs. Woods, 888 F.2d 653, 654 (10th Cir. 1989), which adopts the Zipes principle (filing with EEOC as "not jurisdictional," cert. denied 494 U.S. 1006 (1990).

The Tenth Circuit erroneously concluded that Jones had abandoned the main claim that she had lodged with EEOC. This claim appears and was argued from the inception with the EEOC through the trial court and the Tenth Circuit and appears on the face of the pleadings. The Tenth Circuit court decision holding the filing with EEOC to be jurisdictional is in conflict with this Honorable Court's ruling in Zipes.

Without a "definitive rule," or at least more specific guidance, the lower courts have used a hodgepodge of

conflicting of principles and theories to reach ad hoc and often contradictory conclusions as to whether the filing is jurisdictional or non-jurisdictional. See Tenth Circuit Opinion for the diversity of decisions.

I.

WHETHER FILING A COMPLAINT WITH EEOC AND THEREBY EXHAUSTING ADMINISTRATIVE REMEDIES IS A "JURISDICTIONAL PREREQUISITE" TO SUIT UNDER TITLE VII.

The Tenth Circuit held: "exhaustion of administrative remedies is a 'jurisdictional prerequisite' to suit under Title VII. Sampson v. Civiletti, 632 F.2d 860, 862 (10th Cir. 1980)." In footnote 1 of said Opinion the Court recognizes this Court's decision in Zipes, supra, and states:

> several circuits have concluded that Zipes holding should be extrapolated to include that there is no jurisdictional requirement for

> any filing before the EEOC, but rather that the prerequisite of EEOC filing should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived if it is not asserted by the defendant.

The Tenth Circuit cites the Fifth, Ninth and Eleventh Circuits as relying upon the principle set forth in Zipes; however, It cites the Fourth and Seventh Circuits, as well as Itself, as holding that "exhaustion of administrative remedies is jurisdictional." The Tenth Circuit also recognized Its holding in Woods, supra, which recited the principle set forth in Zipes. This rational in Woods is in conflict with the Tenth Circuit's holding of exhaustion of administrative remedies being jurisdictional; however, the court recognized that pursuant to In re Smith, supra, "one panel cannot overturn the decision of a prior panel."

The Tenth Circuit further stated:

> [W]hen an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge...." Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994) (quotations omitted).

The Tenth Circuit erroneously concluded that Jones had abandoned the sexual harassment charge as originally filed with EEOC, and therefore found that "... when the underlying Title VII violation claim similarly was not exhausted before the EEOC and thus, even the underlying claim was not properly before the court," thereby holding "a court has jurisdiction over ancillary claims 'so long as the court has jurisdiction of the main claim between the original

parties.'"

The Tenth Circuit in Ingels held that is was not necessary to file with EEOC a retaliation claim that is reasonably and timely related to the main claim that is lodged in federal court. Ergo, had the circuit court found the base claim to have been properly brought, then it would have excused the filing of the retaliation claim with EEOC. Eventhough the Tenth Circuit erroneously concludes that Jones had not exhausted administrative remedies, Zipes should control in this instance in that a charge of discrimination was timely before the district court. The question was "technical" as to the type of discrimination. Zipes at 1134, holding:

> Declining to read literally another filing provision of Title VII, we explained that a technical reading would be

> "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Id., at 527, 92 S.Ct., at 619. That principle must be applied here as well.

II.

WHEN A PRO SE COMPLAINANT FILES A CHARGE OF DISCRIMINATION WITH AN EEO COUNSELOR/INVESTIGATOR, IS THERE A DUTY OF THE COUNSELOR/INVESTIGATOR TO ASSIST AND ADVISE THE COMPLAINANT IN FRAMING THE ISSUES?

Jones filed her EEO complaint, pro se, on July 10, 1990, wherein she alleged sex (female) discrimination against her supervisor, Carl Noblitt, in selecting another female, Alice Kilgore, for promotion. At the time, she also requested that the EEO Counselor/Investigator, Johnnie W. Reed, not be assigned to her case, but that an "outside" Investigator be assigned. The Postal Service assigned Johnnie W. Reed as Counselor/Investigator and never even

addressed Jones' request to not assign said Counselor/Investigator. In the course of the informal stages of the investigation, Jones provided Reed with eighteen witnesses. Only two of said witnesses were interviewed by Reed and he summarily concluded that the other witnesses "were not interviewed in that they were all craft employees, co-workers, of the complainant and it was deemed the information would be redundant to the allegations of the complaint at hand." Emphasis ours. Jones gave said Counselor/Investigator affidavits wherein she alleged, inter alia, that she had been discriminated against by subject supervisor when he selected Kilgore and, that said selection was based upon a romantic relationship between Kilgore and subject supervisor; that a male employee,

Mike Morris, had been selected by said supervisor without meeting the minimum qualifications; and that said supervisor

> i. On one occasion Carl told me to come with him. He took me to the Sack storage area and showed me that the Mailhandlers had worked up the empty equipment. There were stacks of bags, stacked about 6 feet tall. He said, "If we turned off the lights we could have a lot of fun in here, don't you think? I rebuked his advance by saying, "I guess my husband and I could."

Said EEO Counselor/Investigator, at the same time Jones' complaint was pending before him, had a companion complaint from another employee (who was one of Jones' eighteen witnesses) alleging that the same supervisor had discriminated against him by failing to select him for promotion because of the sexual relationship between Kilgore and said supervisor. This fact was known to said

EEO Counselor/Investigator, but not to Jones at the time she filed her complaint.

Notwithstanding Jones' request to not have said EEO Counselor/Investigator assigned to her case, the Postal Service proceeded with said Investigator throughout the proceedings. When Jones received her Notice of Final Interview from the agency and was advised that she had fifteen days in which to file a formal complaint, she did comply by filing on the 13th day of November, 1990. When the agency notified her of the issue, sex (female) discrimination, she sent a letter to the agency attempting to clarify that it was not a discrimination charge primarily of promoting a male employee ahead of her, but her complaint was based upon sexual harassment, in that

Kilgore had been afforded preference because of her romantic relationship with the supervisor, Noblitt. 29 CFR 1613.216 covers the investigation of an EEOC complaint and requires investigation of "...any policies and practices related to the work situation which may constitute, or appear to constitute discrimination, even though they have not been expressly cited by the complainant." In the case at bar, the complaint had not only cited all of the aforementioned conduct by the supervisor, but the EEOC Counselor/Investigator had a companion case filed by a different employee alleging far greater and in more detail the conduct of the subject supervisor with the successful candidate, Alice Kilgore. The Investigator should have conducted his investigation in accordance

with 29 CFR 1613 et seq. 29 CFR 1604.11 et seq. provides for the basis of sexual harassment (particularly, subsection (g) provides for others to avail themselves of quid pro quo harassment even though the harassment was not directly targeted at them. (See Appendix "D"). The EEOC held in Trukson v. Department of Treasury, 01860665, 1612/D 14 (1987) that in the course of an investigation the EEOC investigator discovers evidence indicating that the alleged discrimination was on a basis other than cited, he has an obligation to investigate that basis. This principle and contention of Jones is protected in the record from the EEOC filing through the Tenth Circuit Court of Appeals.

The Postal Service does not dispute that it had proper and timely notice of

all of the claims raised by Jones in the EEOC process. It merely claims that Jones did not exhaust some of these claims through the administrative process. The Postal Service does not dispute that it failed to properly advise and assist Jones in the framing of the issues through the EEOC process. The Postal Service should not be permitted to benefit from its own wrongdoing.

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.
>
> Emphasis ours.

Zipes, at 1135.

III.

CAN OTHER FEMALE EMPLOYEES WHO WERE QUALIFIED FOR BUT WERE DENIED THE BENEFIT OF PROMOTION BECAUSE OF FAVORITISM BASED UPON COERCED SEXUAL CONDUCT WITH ANOTHER FEMALE ESTABLISH QUID PRO QUO HARASSMENT UNDER TITLE VII?

The Tenth Circuit asked the parties to address two additional issues, one of which was:

> (2) Can a claimant assert a legally viable Title VII claim based on the following theory: claimant was harmed because employment benefits were conferred on an employee who consented to sexual activity with a supervisor, while claimant, who refused to participate in that activity, was denied the employment benefits.

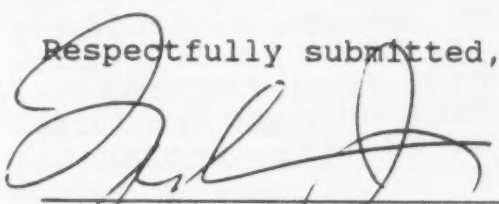
Jones responded thereby by submitting her Supplemental Brief, and in the course of oral argument, the Circuit Court was

apprised of the holding in EEOC Notice Number N-915-048 dated January 12, 1990, Subject: Policy Guidance on Employer Liability under Title VII for Sexual Favoritism. See Appendix "C," paragraph B. holding quid pro quo sexual harassment by others impacted by a female employee being coerced into submitting to unwelcome sexual advances, and "widespread favoritism."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX "A"

ORDER FILED FEBRUARY 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JANET JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-92-1674-C
	)	
MARVIN T. RUNYON, Postmaster General, United States Postal Service,	)	
	)	
	)	
Defendant.	)	

ORDER

This case was originally scheduled to be heard on the Court's January 1995, trial docket. However, after it became clear that each party's trial preparation focused on a different set of issues, the Court denied defendant's motion for summary judgment and, without objection from defendant, directed plaintiff's counsel to file an amended complaint

setting out specifically the basis of her Title VII claim. Defendant has now moved to dismiss this amended complaint or in the alternative requests the entry of summary judgment. Plaintiff responded on February 1, 1995, and the case is now at issue.

In the first round of summary judgment briefs, the government focused on plaintiff's claim that a romantic relationship between others in the workplace resulted in the unfair non-selection of plaintiff for a promotion. In response, plaintiff clarified this was not her claim. The amended complaint clarifies that plaintiff is alleging quid pro quo sexual harassment and the existence of a hostile work environment. (The original complaint pled only discrimination based on sex.) Count I of

the first amended complaint alleges plaintiff was qualified for a certain promotion but that another employee was promoted because plaintiff refused the supervisor's sexual overtures and that submission to sexual demands was a condition upon which the promotion was based. Plaintiff also alleges that selection of the successful candidate for the promotion was because of the romantic involvement of that candidate with her supervisor. Plaintiff labels all these allegations as constituting a violation of 42 U.S.C. § 2000e et seq, and the Civil Rights Act of 1991. For these claims, plaintiff requests an award of actual damages, $300,000.00 in compensatory damages, and an award of costs and attorney's fees. In the next section of the first amended complaint

(also entitled "Count I"), plaintiff alleges she was subjected to various acts of reprisal after reporting the alleged sexual misconduct. Plaintiff requests the same categories of damages for the alleged reprisal.

It has long been established that before a plaintiff may recover under Title VII, exhaustion of administrative remedy is required. See generally, Brown v. General Services Administration, 425 U.S. 820 (1976), and EEOC v. Shell Oil Co., 466 U.S. 54 (1984). Here, plaintiff's administrative proceeding was based on her allegation of sex discrimination, particularly the allegation that the individual promoted was romantically involved with her supervisor and thus received preferential treatment. The only hint of harassment

involving plaintiff personally is reference to certain events for which the time and relationship to the disputed promotion are not specified. There has been no allegation or argument that the reprisal claims have been pursued through an administrative process.

Plaintiff dedicates only a small portion of her response to the issue raised by defendant that plaintiff must first exhaust her administrative remedies as to her claims of quid pro quo sexual harassment and reprisal, or whether these claims were involved with plaintiff's EEOC proceedings. Instead, plaintiff suggests that she did complain about these types of claims during the "EEO investigative process" and directs the Court's attention to page 99 of the Administrative Record for her quid pro

quo claim, and pages 96, 98 and 100 for her hostile environment claim. On page 99 of the Administrative Record, plaintiff details an event involving the plaintiff and Carl Noblitt, the date of which is not specified. Plaintiff also fails to specify how this statement, even if a complaint in its regard was timely, is sufficient to advise the EEOC, and defendant, that plaintiff would pursue a claim based on a theory of quid pro quo sexual harassment. With regard to the hostile environment claim, plaintiff characterizes other passages that plaintiff argues constitute sufficient allegation of a hostile or "offensive working environment." Plaintiff's Response, at 14 (Feb. 1, 1995). Except for one statement possibly occurring in 1987, all allegations relate to the

romantic involvement of others in the workplace which plaintiff has stated is not the basis of her claim.

When plaintiff originated the EEOC investigation, the claims were identified as sexual discrimination pursuant to Title VII's § 703. Administrative Record, at 3. Later, plaintiff attempted to clarify any misconception of her claim by letter, see Administrative Record, at 48, explaining her claim was that another individual had been promoted unfairly because of that individual's relationship with her supervisor.

As noted above, the cause of action for quid pro quo sexual harassment alleged in Count I of the first amended complaint involves plaintiff herself, not some other individual. The second cause of action relates to plaintiff's

allegations that defendant committed acts of retaliation after plaintiff filed her EEOC complaint. Neither of these claims have been presented to the EEOC.

Not only are there statutory requirements for exhaustion, as a practical matter exhaustion also affords both the employer and employee an opportunity for an informal and speedy resolution of these types of employment matters. To bypass this mechanism would be to disregard both the statutory framework and policies that dictated both the employer and the employee should be afforded an opportunity to informally resolve their dispute. Because neither claim identified in the first amended complaint has first been presented to the EEOC, this Court lacks jurisdiction to proceed. Sampson v. Civiletti, 632 F.2d

860 (10th Cir. 1980) (exhaustion of administrative remedies is a jurisdictional prerequisite to a federal employment suit under Title VII).

On the claims which plaintiff has pled, the Court has no jurisdiction as a result of plaintiff's failure to exhaust, and defendant's motion to dismiss must be granted. The amended complaint is hereby dismissed.

IT IS SO ORDERED this 10th day of February, 1995.

/s/_____
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 2-10-95

APPENDIX "B"

OPINION FILED JULY 31, 1996

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANET JONES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 95-6130
	)	
MARVIN T. RUNYON, Postmaster General, United States Postal Service,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the W.D. Okla.
(D.C. No. CV-92-1674-C)

Lewis Barber, Jr., of Barber & Marshall, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Lori J. Dym, Attorney, United States Postal Service, Kay Sewell, Assistant United States Attorney, Oklahoma City, Oklahoma (Vicki Miles-LaGrange, United States Attorney, Oklahoma City, Oklahoma, R. Andrew German, with them on the briefs), for Defendant-Appellee.

Before **SEYMOUR**, Chief Judge, **TACHA**, and **EBEL**, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff Janet Jones appeals an order of the district court granting defendant's motion to dismiss this Title VII action. The district court concluded that it lacked jurisdiction over the action because Jones had failed to exhaust her administrative remedies. We affirm.

Exhaustion of administrative remedies is a "jurisdictional prerequisite" to suit under Title VII. Sampson v. Civiletti, 632 F.2d 860, 862

(10th Cir. 1980).[1]

---

[1] Subsequent to our decision in Sampson, the Supreme Court in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) held that a timely filing before the EEOC was not jurisdictionally required to maintain suit in the district court. 455 U.S. at 393. Several circuits have concluded that the Zipes holding should be extrapolated to include that there is no jurisdictional requirement for any filing before the EEOC, but rather that the prerequisite of the EEOC filing should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived if it is not asserted by the defendant. See, e.g., Temengil v. Trust Territory of Pacific Islands, 881 F.2d 647, 654 (9th Cir. 1989) (relying on Zipes and holding that "[p]ursuit of administrative remedies is a condition precedent to a Title VII claim. The requirement, however, is not jurisdictional."), cert. denied, 496 U.S. 925 (1990); Womble v. Bhangu, 864 F.2d 1212, 1213 (5th Cir. 1989) (holding that the district court erred in concluding it lacked subject matter jurisdiction over plaintiff's Title VII claims where she failed to exhaust her administrative remedies with the EEOC, and concluding that, in light of Zipes, the district court "did no more than determine that her Title VII claim was barred; not that the court lacked jurisdiction of it"); Jackson v. Seaboard Coast Line R.Co., 678 F.2d 992, 1005 (11th Cir. 1982) ("[T]he filing of an

---

EEOC charge is not a jurisdictional prerequisite" to a Title VII suit in federal court.); but see Davis v. North Carolina Dep't of Correction, 48 F.3d 134, 137-39 (4th Cir. 1995) (before a federal court may assume jurisdiction over a claim under Title VII, a claimant must exhaust administrative procedures); Bullard v. Sercon Corp., 846 F.2d 463, 468 (7th Cir. 1988) ("Title VII's requirement that the plaintiff exhaust the administrative remedies provided by the statute is jurisdictional; that is, a court is obligated to enforce the requirement even if the defendant has overlooked it."); Hrivnak v. First Michigan Corp., 617 F.Supp. 990, 991-92 (E.D. Mich. 1985) (holding that the court lacked jurisdiction where plaintiff did not file a charge with the EEOC or pursue administrative remedies before filing suit and distinguishing Zipes because the plaintiff there failed to meet the statutory time limit, a provision separate from the jurisdictional provision).

Nevertheless, even after Zipes our court has referred to the requirement of an EEOC filing (as opposed to a mere requirement of a timely filing) as a jurisdictional requirement. See e.g. Knopp v. Magaw, 9 F.3d 1478, 1479 910th Cir. 1993) ("In the Tenth Circuit, administrative '[e]haustion is a jurisdictional prerequisite to suit under 42 U.S.C. § 2000e-16.'"); Khader v.

Aspin, 1 F.3d 968, 970 (10th Cir. 1993) (stating that "'exhaustion of administrative remedies is a jurisdictional prerequisite' to instituting a Title VII action in federal court"); Hill v. Ibarra, 954 F.2d 1516, 1522 (10th Cir. 1992) (citing Sampson for the proposition that "failure to exhaust administrative remedies as required by 42 U.S.C. § 2000e-16 precludes enforcement of rights created under Title VII:); Johnson v. Orr, 747 F.2d 1352, 1356 (10th Cir. 1984) ("The Tenth Circuit has held that exhaustion of administrative remedies is a jurisdictional prerequisite to suit under § 2000e-16."); Harbison v. Goldschmidt, 693 F.2d 115, 118 (10th Cir. 1982) (with respect to a Title VII action, "[t]he consistency as to issues or claims in the agency and the court is also an aspect of the required exhaustion of administrative remedies which is treated as a jurisdictional matter"); but see United States v. Woods, 888 F.2d 653, 654 (10th Cir. 1989) (dicta contained in a parenthetical characterizing Zipes as standing for the proposition that "exhaustion of administrative remedies is not [a] jurisdictional prerequisite to [a] Title VII suit but [is] merely [a] condition precedent subject to waiver and estoppel"), cert. denied, 494 U.S. 1006 (1990).

Because one panel cannot overturn the decision of a prior panel, we are

We review de novo the district court's dismissal of an action for lack of subject matter jurisdiction. Weiss v. United States, 889 F.2d 937, 938 (10th Cir. 1989); see also Vinieratos v. United States Dep't of Air Force, 939 F.2d 762, 767-68 (9th Cir. 1991) (whether claimant has exhausted his administrative remedies is a question of law reviewable de novo).

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bound by our prior Tenth Circuit authority. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994). In any event, the distinction between whether a prior EEOC filing is a jurisdictional requirement or a non-jurisdictional condition precedent that can be waived is immaterial with respect to Jones' underlying claim for sex discrimination. The defendant here, in its motion to dismiss, unequivocally asserted Jones' failure to assert that claim before the EEOC, and thus there was no waiver by this defendant of that defense, even if it is considered to be a non-jurisdictional defense. The district court dismissed the underlying claim for sex discrimination on this basis, and as pointed out in the text, we find no error in that ruling.

Jones, as an employee of the United States Postal Service, filed a complaint of sex discrimination with the Postal Service on September 4, 1990. After the Postal Service rendered its "Final Agency Decision" of no discrimination, Jones appealed to the United States Equal Employment Opportunity Commission (EEOC). The EEOC likewise found that Jones had not been subjected to unlawful discrimination. Jones then filed this action against the Postal Service in the United States District Court for the Western District of Oklahoma. The district court found, however, that the issues raised in Jones' complaint had not been raised before the EEOC, and therefore had not been administratively exhausted. "[W]hen an employee seeks judicial relief for incidents not listed

in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge....." Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994) (quotations omitted). Therefore, we examine both Jones' original charge to the EEOC and her federal court complaint to determine whether the issues she raised to the district court were both new and unrelated to her EEOC charges, thus defeating the court's jurisdiction over her action.

In her formal EEOC complaint, Jones alleged her rights had been violated because another woman for whom the supervisor professed love was promoted instead of her, and she alleged that the other woman had submitted to sexual

advances from that supervisor. The supervisor was one of three officials having input in the promotion decision. Jones asserted she was discriminated against because she was denied the promotion even though she was qualified. JOnes later notified the EEOC that she was not complaining of sexual discrimination because she was a female, but rather discrimination based on the relationship between the supervisor and the woman who was promoted.[2] The EEOC found that while Jones had included a statement in her affidavit that the

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[2] Specifically, Jones told the EEOC, "The type of harassment you have listed is sex-female, this is incorrect. I was not discriminated against because of being female. I was discriminated against because of a relationship between Carl Noblit [the supervisor] and Alice Kilgore [the employee with whom Noblit had a romantic relationship]." Plaintiff's App. at 175 (emphasis added).

supervisor made a remark to her on an unspecified date that she interpreted to be a sexual advance, that allegation was not raised in her formal complaint, which concerned only the promotion of another woman. Thus, any suggestion of personal sexual harassment was not timely raised before the EEOC and therefore it would not be considered. The EEOC framed Jones' issue as being "whether [Jones] has established that she was discriminated against on the basis of sexual harassment when she was nonselected for promotion...." Plaintiff's App. at 264.

In the district court, Jones changed her complaint to allege that submission "to unwelcome sexual advances from supervisors was a condition precedent to promotion." Id. at 108. Jones alleged

that she had refused the sexual overtures of her supervisor, which occurred two weeks prior to the promotion interview. She concluded that she was not selected because of her refusal and because the supervisor had instead selected another woman who had not "openly rebut[ted]" his sexual demands. Id. at 107. She alleged the supervisor also failed to disclose information adverse to the selected woman which would have prohibited her promotion if revealed.

The district court granted defendant's motion to dismiss, holding that Jones had not exhausted her administrative remedies. The court held that in the district court Jones was alleging quid pro quo sexual harassment and the existence of a hostile work environment, issues she had not raised to

the EEOC. We agree. Jones specifically stated to the EEOC that she was not claiming she personally was subjected to sexual harassment. She, therefore, explicitly abandoned that issue and, thus, failed to exhaust it before the EEOC. Exhaustion of administrative remedies is required before a plaintiff may bring a federal action. Sampson, 632 F.2d at 862.[3]

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[3] As discussed above, Jones' claim before the EEOC was not that she was discriminated against because of her sex, but that she was discriminated against "because of a relationship between [her supervisor] and [a co-worker]." To the extent Jones reasserts this claim on appeal, independent of her quid pro quo and hostile environment claims argued in the district court, we do not reach it because it was not argued before the district court. See Federal Deposit Ins. Corp. v. Bachman, 894 F.2d 1233, 1235 (10th Cir. 1990). The district court found that Jones was not claiming in the district court that a "romantic relationship between others in the workplace resulted in the unfair non-selection of [Jones] for a promotion."

Jones also alleged in the district court that defendant retaliated against her for filing her EEOC complaint. The alleged retaliatory acts included not giving her a step increase as required by personnel policies and practices and, ultimately, suspending her. We note that although the retaliation claim was not brought before the EEOC, this fact is not necessarily dispositive. "[A]n act

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Indeed, the district court observed that "plaintiff clarified that this was not her claim." District Court Order at 1 (emphasis added); see also id. at 3. Rather, the district court concluded that Jones was alleging "quid pro quo sexual harassment and the existence of a hostile work environment," id. at 1, and that her allegations regarding the alleged romantic relationship were made only in support of these claims, see id. at 1-2. Jones has not objected to this characterization of her claims. Finally, we likewise do not reach Jones' claim on appeal that the EEOC inadequately investigated her claims during its administrative review because this issue was not raised below.

committed by an employer in retaliation for the filing of an EEOC complaint is reasonably related to that complaint, obviating the need for a second EEOC complaint." Ingels, 42 F.3d at 625 (quotations omitted). The issue here, however, is whether Jones' retaliation claim was properly before the court where the court had no underlying claim on the merits properly before it. In other words, may a party bring an action for retaliation which has not been exhausted before the EEOC, when the underlying Title VII violation claim similarly was not exhausted before the EEOC and thus, even the underlying claim was not properly before the court?[4] We answer in

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[4] We here address only the issue as framed. If Jones' underlying claim were properly before the court, the court could address the retaliation claim regardless of whether she prevailed on

the negative.

When a party brings a claim of retaliation in conjunction with a Title VII claim, the party asks the court to exercise ancillary jurisdiction[5] over the retaliation claim. See Gupta v. East Tex. State Univ., 654 F.2d 411, 413-14 (5th Cir. 1981) (district court has ancillary jurisdiction to hear

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her underlying claim. See Ingels, 42 F.3d at 625 n.8.

[5] The principle of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." Kokkonen v. Guardian Life Ins., 114 S.Ct. 1673, 1676 (1994); see also Sandlin v. Corporate Interiors Inc., 972 F.2d 1212, 1216 (10th Cir. 1992) (ancillary jurisdiction is based on the premise that a court may exercise jurisdiction to decide matters incident to the disposition of a dispute properly before it even though it would not otherwise have jurisdiction over the matters) (citing 6 Charles A. Wright et al., Federal Practice & Procedure § 1444 at 316-17 (2d ed. 1990).

retaliation claim growing out of earlier charge of Title VII violation). We have held that a court has jurisdiction over ancillary claims "so long as the court has jurisdiction of the main claim between the original parties." King Fisher Marine Serv., Inc. v. 21st Phoenix Corp., 893 F.2d 1155, 1158 (10th Cir.), cert. denied, 496 U.S. 912 (1990); see also First Golden Bancorporation v. Weiszmann, 942 F.2d 726, 731 (10th Cir. 1991) (if jurisdiction prerequisites are satisfied when the suit originates, subsequent events will not defeat jurisdiction).

Thus, a court has jurisdiction to hear an ancillary claim of retaliation only when the main administrative charge is properly before the court. See Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473,

479 (5th Cir. 1991) (because one of plaintiff's ADEA claims was untimely and the other had not been presented first to the EEOC, claims were not properly before the court and retaliation charge had "no charge on which to attach itself," therefore, court had no jurisdiction over retaliation claim); Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 762 (11th Cir. 1995) (because underlying age discrimination claim was untimely and because plaintiff did not move to amend complaint until after pretrial order entered, court did not abuse its discretion in denying retaliation amendment); cf. Gottlieb v. Tulane Univ., 809 F.2d 278, 284 (5th Cir. 1987) (because plaintiff's initial Title VII claim was properly before the court, court had ancillary jurisdiction over

retaliation claim). While an ancillary claim of retaliation "does not require that the plaintiff prevail on the underlying claim of discrimination," Ingels, 42 F.3d at 625 n.8, such a claim does require that the plaintiff satisfy all jurisdictional prerequisites with respect to the underlying claim of discrimination when, as here, the retaliation claim suffers the defect of non-exhaustion and jurisdiction is sought to be maintained as ancillary jurisdiction.[6]

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[6] The distinction between characterizing the EEOC filing requirement as either jurisdictional or as a non-jurisdictional affirmative defense could have an impact on our ruling regarding Jones' retaliation claim. As pointed out above, we are obligated to consider this requirement as jurisdictional by our prior precedent, and thus our analysis of Jones' retaliation claim proceeded accordingly. If, however, we were to conclude that the filing requirement is non-jurisdictional,

The judgment of the United States District Court for the Western District of Oklahoma is **AFFIRMED.**[7]

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then the district court would have had ancillary jurisdiction to consider the non-exhausted retaliation claim. See Ingels, 42 F.3d at 625.

[7] Because of our decision here, we need not reach Jones' claim of entitlement to a trial by jury.

APPENDIX "C"

EEOC NOTICE NUMBER N-915-048

January 1990

Subject: Policy Guidance on Employer Liability under Title VII for Sexual Favoritism

....

B. Favoritism Based Upon Coerced Sexual Conduct May Constitute Quid Pro Quo Harassment.

If a female employee[6] is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit.[7] Thus, in order for a woman to have obtained the job benefit at issue, it would have been necessary to grant

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[6] Although this Police Guidance uses female pronouns to refer to individuals who are treated favorably because they engage in sexual conduct, it also covers situations in which men are granted favorable treatment based on sexual conduct.

[7] The employer would also be liable for "quid pro quo" harassment with regard to the individual who was coerced into submitting to the advances.

sexual favors, a condition that would not have been imposed on men. This is substantially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a "quid pro quo" in return for job benefits.[8] For example, in Toscano v. Nimmo, 570 F.Supp. 1197, 1199-1201, 32 EPD Para. 33,848 (D.Del. 1983), the court found a violation of Title VII based on the fact that the granting of sexual favors was a condition for promotion. Although the individual who was granted preferential treatment was engaged in a consensual affair with her supervisor, there was evidence that the supervisor made telephone calls to proposition several female employees at home, phoned employees at work to describe his supposed sexual encounters with female employees under his supervision, and engaged in suggestive behavior at work.[9]

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[8] See Section 1604.11(1) of EEOC's Guidelines on Sexual Harassment, which states that a violation will be found when submission to unwelcome sexual conduct is made "either explicitly or implicitly" a term or condition of an individual's employment.

[9] See also DeCintio v. Westchester County Medical Center, 807 F.2d at 307, in which the court stated that the claim in Toscano was premised on the coercive nature of the employer's acts, and therefore that the case lent no support to the contention that a voluntary amorous involvement may form the basis of

Many times, a third party female will not be able to establish that sex was generally made a condition for the benefit in question. For example, a supervisor may have been interested in only one woman and, thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced. See EEOC amicus brief (filed Sept. 30, 1988) in Clayton v. White Hall School District, 875 F.2d 676, 50 EPD para. 39,048 (8th Cir. 1989), in which the Commission argued that a white employee had standing under Title VII to challenge her employer's decision to deny her an employment benefit pursuant to an employment policy which it allegedly enforced for the purpose of denying the same benefit to a black employee; although the plaintiff was not the object of racial discrimination, she was injured as a result of the race discrimination practiced against the black employee.[10] See also DeCintio v. Westchester County Medical Center, 807 F.2d at 307-08 (by

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a Title VII claim.

[10] In Clayton, the court ruled that the plaintiff did have standing, but it based that standing on her allegation of a hostile work environment. 875 F.2d at 679.

implication) (male plaintiff's claims of favoritism rejected not because of lack of standing but because the woman who received the favorable treatment was not coerced into submitting to sexual advances); EEOC v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690 n.2, 27 EPD para. 32,202 (5th Cir. 1981) (white plaintiffs could challenge discrimination against blacks provided that they could establish a personal injury); Allen v. American Home Foods, Inc., 644 F.Supp. 1553, 42 EPD para. 36, 911 (N.D. Ind. 1986) (males who lost their jobs due to their employer's discrimination against female coworkers suffered an injury as a result of the discrimination, and therefore had standing to sue under Title VII).

APPENDIX "D"

29 CFR § 1604.11(g)

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(2)

Supreme Court, U.S.
FILED
FEB 3 1997
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No. 96-684

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET JONES, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in an employment discrimination case brought by a federal employee under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, the federal employee must exhaust the administrative remedies as set forth in 42 U.S.C. 2000e-16(c) prior to filing a civil action under Title VII in federal court.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-684

JANET JONES, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 1-19) is reported at 91 F.3d 1398. The opinion of the district court (Pet. App. A at 1-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1996. The petition for a writ of certiorari was filed on October 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1990, petitioner, a United States Postal Service employee, filed an administrative complaint

with the Postal Service, alleging that she had been the victim of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. B at 7; C.A. App. 51-56. Petitioner alleged that a co-worker had been promoted "because of situations in which employment opportunities and benefits were granted because of [a supervisor's] love for [the co-worker]." C.A. App. 52. Petitioner claimed that her rights had been violated "according to Section 703 of title VII of the civil rights act" which applies to a situation "in which employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or request for sexual favors. The employer may be held liable for unlawful sex discrimination against other employees who were qualified for, but denied the employment opportunity or benefit." *Id.* at 55 (paraphrasing 29 C.F.R. 1604.11(g)).

The Postal Service's equal employment opportunity (EEO) office acknowledged receipt of petitioner's administrative complaint and informed petitioner that it would investigate her claim that she was denied a promotion because of discrimination based on "Sex (female)." C.A. App. 174. Petitioner responded to the Postal Service's notice, informing it that its definition of her claim was inaccurate. She wrote:

> The type of harassment you have listed is sex-female, this is incorrect. I was not discriminated against because of being female. I was discriminated against because of a relationship between [a supervisor] and [a co-worker]. I am filing under sexual harassment in accordance with Sec. 703 of title VII.

Id. at 175; Pet. 6. Petitioner again paraphrased the sexual harassment regulation, 29 C.F.R. 1604.11(g). C.A. App. 175; Pet. 6. In response to petitioner's letter, the Postal Service's EEO office changed the purview of its investigation of petitioner's administrative complaint to an investigation of her alleged denial of a promotion because of sexual harassment. C.A. App. 176-179.

After investigation and an unsuccessful attempt to resolve the matter informally, the Postal Service notified petitioner that it proposed to close her case with a finding of no discrimination based on sexual harassment. C.A. App. 241-243. It concluded that the record was "devoid of evidence that any employment opportunities or benefits were granted to [the coworker] on the basis of her submission to sexual advances or requests for sexual favors." *Id.* at 241. It also explained that, assuming arguendo that the coworker "was selected on the basis of sexual favoritism, this alone does not necessarily violate Title VII. The [Equal Employment Opportunity] Commission has adopted the position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a 'paramour' does not violate Title VII since *both men and women are disadvantaged for reasons other than* their gender." *Ibid.* The Postal Service added that, in the instant case, three officials were involved in selecting the persons to be promoted and that all three had agreed on those promoted. *Id.* at 242. It concluded that "a preponderance of the evidence shows that management's actions were taken for non-discriminatory reasons and that you have not satisfied your burden of proving that the Postal Service intention-

ally discriminated against you." *Ibid.* The Postal Service adopted the recommended disposition as its final agency decision. *Id.* at 245.

b. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC) (C.A. App. 250) which affirmed the agency's decision (*id.* at 264-274). The EEOC reviewed petitioner's sexual harassment claim regarding the favoritism accorded her co-worker under both a quid pro quo and hostile work environment analysis, as set forth in *Meritor Savings Bank, F.S.B.* v. *Vinson*, 477 U.S. 57 (1986). The EEOC expressly found that petitioner was not alleging that she was personally subjected to quid pro quo sexual harassment, but rather that she was discriminated against because of the favoritism accorded the co-worker. C.A. App. 270. The EEOC recognized that favoritism based on coerced sexual conduct may constitute quid pro quo harassment if other qualified female employees who were denied certain employment benefits can establish that sex was, in general, made a condition for receiving such employment benefits. *Ibid.* The EEOC noted, however, that an isolated instance of preferential treatment based on a consensual romantic relationship does not discriminate against men or women in violation of Title VII because both groups are equally disadvantaged by the favoritism. *Ibid.* (citing *Miller* v. *Aluminum Co. of America*, 679 F. Supp. 495 (W.D. Pa.), aff'd mem., 856 F.2d 184 (3d Cir. 1988); *DeCintio* v. *Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, EEOC Notice No. N-915-048, (Jan. 12, 1990)). The EEOC concluded that, after a thorough review of the entire record, there was no

persuasive evidence that the co-worker and supervisor had been engaged in a romantic relationship (coerced or consensual), that the co-worker had submitted to the supervisor's advances, or that the supervisor had made the co-worker's submission to his advances a condition for the granting of employment benefits generally, or the disputed promotion in particular. C.A. App. 271.

The EEOC also concluded that petitioner had not made out a hostile work environment violation of Title VII based on the supervisor's alleged favoritism toward her co-worker because of a romantic relationship, finding that petitioner had "not alleged, nor is there other evidence suggesting, that the alleged behavior of the [supervisor] was more widespread or was extended to employees other than the [co-worker], or that supervisors generally conveyed the message that female employees could be promoted by engaging in sexual conduct." C.A. App. 271-272. The EEOC pointed to the promotion of other females and males at the same time as the challenged promotion of the particular co-worker[1] and to the fact that there was no evidence that any of them were engaged in relationships with the supervisors. *Id.* at 272. The EEOC held that the supervisor's conduct had not been sufficiently severe or pervasive to create a hostile

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[1] The EEOC explained that petitioner was one of 13 applicants (eight females, five males) referred for consideration by the promotion board (one female, two males), and that six applicants (three female, three male) were promoted by the final selection committee (three males (including the supervisor alleged to be romantically involved with one of the females promoted)). C.A. App. 266. Two higher level Postal Service officials affirmed the choices. *Id.* at 267 n.4.

working environment. *Ibid.*[2] The EEOC also rejected, as not supported by the record, petitioner's contention that the Postal Service was biased and did not conduct a thorough investigation. *Id.* at 273.

c. Petitioner filed a request to reopen with the EEOC, alleging, inter alia, that the EEOC should have applied the analysis set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), instead of the *Meritor Savings Bank* analysis. C.A. App. 255-260. Petitioner claimed that she should prevail under the *McDonnell Douglas* analysis because she had made out a prima facie case, and the Postal Service did not have a legitimate business reason for selecting the co-worker for promotion. *Ibid.* Petitioner also sought to reopen her case based on an allegation of inadequate investigation.

The EEOC denied petitioner's request to reopen (C.A. App. 275-281), concluding, inter alia, that its previous decision properly treated petitioner's complaint as an allegation of sexual harassment based on favoritism to a co-worker and correctly concluded with a finding of no discrimination (*id.* at 279). The EEOC emphasized the fact that on two occasions, first in her response to the Postal Service and again

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[2] The EEOC noted that "in her affidavit, [petitioner] raised allegations of sexual harassment when, in 1987, several supervisors made inappropriate remarks to [her] about her personal life as it related to her promotability, and when on an unspecified date the [supervisor] made a remark to [petitioner] which she interpreted to be a sexual advance." C.A. App. 269. The EEOC found that "these allegations were not raised by [petitioner] in her formal complaint, which concerns only her nonselection for the position of Supervisor, Mails. There is no evidence that these allegations were timely raised with an EEO Counselor; therefore, they are not presently at issue." *Ibid.*

in her appeal brief to the EEOC, petitioner expressly argued that her case should be reviewed under Title VII sexual harassment law and the EEOC's sexual harassment regulation relating to benefits granted to another employee because of that employee's submission to the employer's sexual advances, 29 C.F.R. 1604.11(g). C.A. App. 279. The EEOC rejected petitioner's attempt to recast her complaint as one of unlawful disparate treatment based on sex. *Ibid.* The EEOC also noted that, even if petitioner's case were analyzed under *McDonnell Douglas*, petitioner would not prevail because she could not make out a prima facie case and had not established that the Postal Service's explanation was a pretext for discrimination. *Id.* at 280.

2. Following the EEOC's affirmance of the Postal Service's decision, petitioner filed the instant action in the United States District Court for the Western District of Oklahoma, claiming that she had been subjected to discrimination on the basis of sex by the Postal Service, in violation of Title VII. In an amended complaint, petitioner alleged that she had been personally subjected to quid pro quo sexual harassment and a hostile work environment. Pet. App. A at 2-3. Specifically, petitioner alleged, inter alia: That two weeks before her promotion interview, she had been "asked by her supervisor to engage in sexual intercourse, which she refused"; that one of the reasons she had not been selected for promotion was because of her "refusal to submit to the sexual demands of her supervisor"; that "a qualification for the position was submission to the sexual advances of her supervisor"; that "the overall environment was such that female employees were not promoted on an equal basis unless they submitted to unwanted sexual

demands of supervisors"; that she "was subjected to unwanted sexual advances on a continuing basis until she filed her EEO complaint against the Postal Service"; and that "the practice of female employees submitting themselves to unwelcome sexual advances from supervisors was a condition precedent to promotion." C.A. App. 106-108. Petitioner also repeated the claim from her administrative complaint that her supervisor's decision to promote her co-worker was "based upon his romantic involvement with the successful candidate." *Id.* at 107-108.

In a second count, petitioner alleged that the Postal Service had retaliated against her for filing her complaint of discrimination. Pet. App. A at 3-4. The alleged retaliation included not giving petitioner a step increase and, ultimately, suspending her. Pet. App. B at 13.

The district court dismissed the complaint. Pet. App. A at 1-9. The court held that it lacked subject matter jurisdiction because petitioner had not exhausted administrative remedies. *Id.* at 4, citing *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), and *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984). The court found that petitioner's administrative proceeding had been based on her allegation of sex discrimination due to the promotion of a co-worker who had been given preferential treatment because she was romantically involved with the supervisor, Pet. App. A at 4—*i.e.* a claim "that *another* individual had been promoted unfairly because of *that* individual's relationship with her supervisor," *id.* at 7. By contrast, petitioner's district court "cause of action for *quid pro quo* sexual harassment alleged in Count I of the first amended complaint involves plaintiff herself, not some other

individual." *Ibid.*[3] The court concluded that that claim and petitioner's retaliation claim had not been presented administratively. *Id.* at 8. Therefore, because administrative exhaustion is a jurisdictional prerequisite to suit in federal court under Title VII, the court held that it had no jurisdiction over petitioner's case. Pet. App. A at 8-9 (citing *Sampson* v. *Civiletti*, 632 F.2d 860 (10th Cir. 1980)).

3. The court of appeals affirmed. Pet. App. B at 1-19. The court found that, in her formal EEOC complaint, petitioner's claim that her rights had been violated was based on the allegation that a co-worker was promoted instead of petitioner because the supervisor had a romantic relationship with the co-worker. *Id.* at 9. The court noted that petitioner specifically had disavowed in the administrative proceedings that her claim there was based on sexual harassment discrimination against her personally on account of her sex. *Id.* at 9 n.2, 12. The court also pointed to the EEOC's ruling that petitioner's administrative claim was limited to her concern with the denial of a

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[3] The court found that "[t]he only hint of harassment involving [petitioner] personally" in the administrative proceeding was "reference to certain events for which the time and relationship to the disputed promotion are not specified." Pet. App. A at 4-5. The court concluded that the one allegation involving petitioner and the supervisor on an unspecified date was insufficient to advise the Postal Service or the EEOC that petitioner would pursue a quid pro quo sexual harassment claim based on that allegation. *Id.* at 6. The court also concluded that all but one of the allegations on which petitioner attempted to rely to demonstrate exhaustion of her new hostile environment claim were allegations relating to the romantic involvement of others in the workplace "which [petitioner] * * * stated is *not* the basis of her claim" in federal court. *Id.* at 7.

promotion and noted that any claim that petitioner belatedly tried to raise regarding a sexual advance directed toward her personally had not been timely raised in the administrative proceeding. *Id.* at 10. Thus, the court of appeals concluded that petitioner changed her complaint in the district court to allege quid pro quo sexual harassment and the existence of a hostile work environment that she had not raised administratively. *Id.* at 11-12.[4] Petitioner's failure to exhaust administrative remedies for those claims required the court to affirm the district court's dismissal for lack of jurisdiction. *Id.* at 2-3 (citing *Sampson, supra*).[5]

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[4] The court of appeals stated that, to the extent petitioner reasserted before it the claim that she had, in fact, exhausted based on discrimination because of the relationship between a supervisor and co-worker, the court would not reach that claim because petitioner had not argued it before the district court. Pet. App. B at 12-13 n.3. The court of appeals also did not reach petitioner's claim of an inadequate administrative investigation because she had not raised it below. *Ibid.* In light of its ruling affirming the dismissal of the case, the court of appeals did not reach petitioner's claim regarding a jury trial. *Id.* at 19 n.7.

[5] The court of appeals adhered to prior circuit authority, holding that exhaustion of administrative remedies is a jurisdictional prerequisite to suit in federal court under Title VII. Pet. App. B at 3-6 n.1. The court noted, however, that some other circuits have concluded that the prerequisite of an EEOC filing "should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived." *Id.* at 3 n.1. The court concluded that the distinction regarding whether exhaustion was jurisdictional or could be waived "is immaterial with respect to [petitioner's] underlying claim for sex discrimination" because respondent asserted the ground in its motion to dismiss and there is no question of waiver here. *Id.* at 6 n.1.

With regard to petitioner's retaliation claim, the court of appeals stated that her failure to bring a second complaint before the EEOC to raise that claim was not necessarily dispositive because district courts may exercise ancillary jurisdiction over such claims that are reasonably related to exhausted claims. Pet. App. B at 13-15 & n.5. The court concluded, however, that exercise of ancillary jurisdiction was not appropriate where, as here, the underlying claim was not exhausted and therefore was not, itself, properly before the district court. *Id.* at 18.[6]

ARGUMENT

1. Petitioner contends (Pet. 9-10) that the Court should grant review in this case "to resolve a split between the federal circuit courts of appeal on whether or not subject matter jurisdiction in federal court can be invoked when there has been no filing with the EEOC." Petitioner relies (Pet. 12, 14-15) on the cases cited by the court of appeals below, indicating that the Fifth, Ninth and Eleventh Circuits have held that filing of an EEOC charge is not a jurisdictional prerequisite under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioner also relies on (Pet. 10-18) *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), in which the Court held that the statutory time limit for filing charges with the EEOC under Section 2000e-5(e) is not

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[6] The court stated that, in this regard, if exhaustion of administrative remedies were not a jurisdictional prerequisite to suit in federal court, the district court would have had ancillary jurisdiction to consider the retaliation claim. Pet. App. B at 18-19 n.6.

jurisdictional, but rather is subject to tolling similar to a statute of limitations.

Petitioner's argument disregards the fact that the defendant against whom the Title VII claims were brought in this case is the United States Postal Service, not a private employer. The jurisdiction of district courts over Title VII claims brought against the Postal Service rests on 42 U.S.C. 2000e-16, not on 42 U.S.C. 2000e-5 (which establishes administrative and federal court jurisdiction over complaints against private employers), or 42 U.S.C. 2000e-2 (which prohibits discriminatory employment practices by private employers), as petitioner appears to suggest (Pet. 3).

As originally enacted in 1964, Title VII did not extend to discrimination by the federal government. Congress amended Title VII in 1972, however, to add a new section, Section 717, to require nondiscrimination in federal government employment. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111. That prohibition against discrimination in federal government employment is now set forth, as amended, in 42 U.S.C. 2000e-16, which provides, in relevant part, that:

> All personnel actions affecting employees * * * in military departments * * *, in executive agencies as defined in section 105 of title 5 * * *, in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress,

> shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. 2000e-16(a). Section 2000e-16(b) grants the EEOC the authority to enforce Section 2000e-16(a). Section 2000e-16(c) describes the complaint procedure to be followed by a federal employee, including the filing of a complaint with his or her employing agency, an optional appeal to the EEOC, and the right to file a suit in federal court upon the agency's or the EEOC's final disposition of the complaint, or failure to take final action on the complaint within a certain time period. Section 2000e-16(c) specifies that:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the [EEOC] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, * * * or after one hundred and eighty days from the filing of the initial charge with the department, agency or unit or with the [EEOC] on appeal * * * until such time as final action may be taken by a department , agency, or unit, *an employee* * * * *if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action* as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. 2000e-16(c) (emphasis added).

The text of Section 2000e-16(c) makes clear that a federal employee may proceed with a Title VII claim

in federal court only if that employee has pursued a complaint with his or her employing agency, and has either obtained an unfavorable final disposition or has been unable to obtain a timely decision. Congress thereby evidenced its intent that, as a condition of subjecting the federal government to suit in district court under Title VII, a federal employee must first file a complaint with his or her employing agency. *Brown* v. *General Services Administration*, 425 U.S. 820, 832 (1976). This Court has expressly recognized that Title VII "provides for a careful blend of administrative and judicial enforcement powers" in an enforcement system characterized by "balance, completeness, and structural integrity." *Id.* at 832-833. Moreover, the Court has emphasized "[t]he crucial administrative role that each agency * * * was given by Congress in the eradication of employment discrimination" under the statute. *Id.* at 833. Under *Brown*, the exhaustion of administrative remedies is a condition precedent to suit against the federal government under Title VII. *Ibid.* See also *Chandler* v. *Roudebush*, 425 U.S. 840, 852, 863 (1976).

Petitioner does not contend that there is a conflict in the circuits regarding exhaustion of administrative remedies prior to an action under Section 2000e-16 against the federal government. The cases petitioner identifies as presenting a conflict in the circuits are cases that did not involve the pursuit of unexhausted claims against the federal government. Most involve private employers as defendants. See *Womble* v. *Bhangu*, 864 F.2d 1212 (5th Cir. 1989); *Bullard* v. *Sercon Corp.*, 846 F.2d 463 (7th Cir. 1988); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Hrivnak* v. *First of Michigan Corp.*, 617 F. Supp. 990 (E.D. Mich. 1985). The defendant in

Davis v. *North Carolina Dep't of Correction*, 48 F.3d 134 (4th Cir. 1995), was an entity of a state government. Federal defendants were named in *Temengil* v. *Trust Territory of Pacific Islands*, 881 F.2d 647 (9th Cir. 1989), cert. denied, 496 U.S. 925 (1990), but the Title VII claims against the federal defendants were disposed of on a motion for summary judgment, not on a motion to dismiss for failure to exhaust. The *Temengil* court's discussion of exhaustion addressed only the dismissal on exhaustion grounds of claims against the government of the Northern Mariana Islands, which is legally distinct from the United States government. See *Temengil*, 881 F.2d at 653-654.

Application of those rulings in suits against employers other than the federal government would be inappropriate in the instant case, which involves a waiver of sovereign immunity by the federal government. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). This Court has recognized that "[Section] 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990);[7] cf. *Lehman* v. *Nakshian*, 453 U.S. 156,

[7] In *Irwin*, the Court held that the time limitation for filing suit against the federal government in district court following the exhaustion of administrative remedies, as set forth in Section 2000e-16(c), is analogous to a statute of limitations so that an out-of-time filing is not necessarily a jurisdictional bar to the suit because equitable tolling may

160-161 (1981). Because administrative exhaustion is a condition of the United States' waiver of sovereign immunity under Title VII, the federal courts lack jurisdiction over unexhausted claims brought against the federal government under Section 2000e-16. See *Dollis* v. *Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (holding that plaintiff "satisfied the jurisdictional prerequisite of filing an administrative complaint" in regard to some, but not all, of her claims in an action against the Department of the Treasury); *Grier* v. *Secretary of Army*, 799 F.2d 721, 724 (11th Cir. 1986) (administrative exhaustion requirement in action against federal agency under Section 2000e-16 "is not a technicality," but rather is "part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel 'primary responsibility' for maintaining nondiscrimination in employment"); *Edwards* v. *Department of the Army*, 708 F.2d 1344 (8th Cir. 1983)

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apply. *Irwin*, 498 U.S. at 95. The instant case, unlike *Irwin*, does not involve a time deadline for filing suit and thus does not raise concerns about the inconsistency in previous Court rulings dealing with the effect of time limits in suits against the federal government. *Id.* at 94. And the instant case does not involve the question the Court had left open prior to *Irwin* regarding whether equitable principles such as tolling apply against the government when a statutory filing deadline is involved. *Ibid.* Rather, the instant case involves the requirement that a federal employee pursue a complaint procedure in his or her employing agency before seeking relief in federal court. As noted above, the text of Section 2000e-16(c) indicates that Congress intended such an administrative exhaustion requirement to be a condition of its waiver of sovereign immunity that subjected it to suit under Title VII. Absent fulfillment of such a condition, the terms of the waiver have not been met and the district court lacks jurisdiction.

(federal employee Title VII suit must be dismissed if administrative remedies not exhausted); *Johnson* v. *Bergland*, 614 F.2d 415, 417 (5th Cir. 1980) (suit brought by federal employee against Secretary of Agriculture under Section 2000e-16 must be dismissed if administrative remedies not exhausted); *Hoffman* v. *Boeing*, 596 F.2d 683 (5th Cir. 1979) (federal employee required to exhaust administrative remedies prior to filing suit in district court against Department of the Navy under Section 2000e-16).[8]

2. Petitioner contends (Pet. 18-24) that the equal employment office of the Postal Service, with which she filed her initial administrative complaint, failed to advise and assist her properly in the framing of the issues through the administrative process. Petitioner complains (Pet. 19-21) about the particular EEO counselor/investigator assigned to the case, his

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[8] Although petitioner mentions (Pet. 7-8, 13, 16) her claim of "sexual harassment as processed through the EEOC, which involved [the co-worker and supervisor]," and which was, in fact, exhausted in the administrative proceedings, petitioner does not seek review of the district court's ruling dismissing that claim. The court of appeals declined to address that claim because petitioner had not pursued it in the district court. See note 4, *supra*; see also Gov't C.A. Br. 13 (pointing out that petitioner never articulated why the district court erred in dismissing petitioner's exhausted claim, and explaining that the district court properly dismissed it because it failed to state a claim upon which relief could be granted). Petitioner maintains (Pet. 13, 16-17) that she did not abandon the exhausted claim, but she ultimately rests, instead, on her argument that exhaustion is not a jurisdictional prerequisite to her suit. Pet. 17. And, petitioner concedes (Pet. 8) that, in her amended complaint in district court, she added the new, unexhausted claim that "she had personally been the victim of quid pro quo sexual harassment and discrimination based on gender."

failure to interview several witnesses identified by petitioner, and his failure to inform petitioner about a pending complaint by another employee regarding the same alleged relationship between a supervisor and the co-worker.

The court of appeals declined to address petitioner's challenge to the adequacy of the administrative investigation because petitioner had not raised the issue in the district court. Pet. App. B at 13 n.3. This Court should similarly decline to review the issue that was not properly raised in the district court and not passed on by the court of appeals. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s].") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)).

3. Petitioner also seeks (Pet. 25-26) a ruling by this Court that a claim of quid pro quo sexual harassment discrimination can be based on a claim by a qualified female employee who was denied a promotion because of favoritism by a supervisor toward another female employee who engaged in coerced sexual conduct with him. Petitioner cites the EEOC's policy guidance governing such a claim. Pet. 26.

In light of the district court's ruling dismissing the case for failure to exhaust administrative remedies, it did not address the issue. Similarly, the court of appeals ultimately did not reach the issue, although it had requested supplemental briefing. See Pet. 25. The issue therefore does not warrant review by this Court. See *Taylor*, 503 U.S. at 646.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1997